OPINION.

(248 F. 2d 761.)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11989. SEPTEMBER TERM AND SESSION, 1957.

CHARLES R. HARD, *Petitioner*,
v.
CIVIL AERONAUTICS BOARD, *Respondent*.
} On Petition For Review Of An Order Of The Civil Aeronautics Board.

October 8, 1957.

Before FINNEGAN and SCHNACKENBERG, *Circuit Judges*, PLATT, *District Judge*.

FINNEGAN, *Circuit Judge*. A protocol statement, part of the Congressional declaration of policy in § 2 of the Civil Aeronautics Act of 1938[1] is the main prop for Board[2] action under § 609 of the Act:

> "Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority [Civil Aeronautics Authority, now CAB] shall consider the following, among other things, *as being in the public interest* . . .

1. 52 Stat. 973, 980; 49 U. S. C. A. § 402.

2. Civil Aeronautics Board. See 54 Stat. 1235 for the transfer of Civil Aeronautics Authority; 1940 Reorg. Plan No. IV, § 7, effective June 30, 1940, 5 F. R. 2421.

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in [air] transportation . . . (italics supplied)"

Section 609, in relevant part provides that: "The Authority . . . from time to time . . . may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or *suspend*, in whole or in part, any type certificate . . . airman certificate . . . *if the interest of the public so requires*, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority in refusing to issue to the holder of such certificate a like certificate. In cases of *emergency, any such certificate may be suspended*, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing. The Authority shall immediately give notice of such suspension to the holder of such certificate and shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days."[3]

Challenging a final order of CAB suspending his airline transport pilot rating for six months (with a credit for sixty days) Hard invoked our jurisdiction under § 1006 of the Act[4] coupled with § 1009 of the Administrative Procedures Act,[5] seeking reversal of that decision because it is grounded on the Board's conclusion that: ". . . the accident itself, together with a substantial suspension of . . . [Hard's] airline transport rating, *would provide a sufficient deterrent against* . . . [Hard] *or other pilots*

3. 52 Stat. 1011; Emphasis supplied.
4. 52 Stat. 1024, as amended; 49 U. S. C. § 646(a).
5. 60 Stat. 237; 5 U. S. C. § 1001, *et seq.*

taking similar risks with their passengers' lives." Without disputing the facts concerning his accident, Hard attacks the Board's jurisdiction to impose on him what he categorizes as a "penalty"; while buttressing his contention with the argument that it was error for the Board to try a case under § 609 on a theory that he lacks qualifications for an airline transport pilot rating, and then impose deterrent sanction despite finding him qualified. And in reliance on § 903(b)(1) Hard, the petitioner, asserts he is entitled to a trial by jury on issues involving civil penalties.

By his various points urged in this review, Hard would constrict the Board's power, to suspend his airline transport rating, to only the case where it found him unqualified or lacking ability to fly aircraft. The Board, on the other hand, reading and synthesizing § 2 and § 609 envisages a broad grant of power encompassing deterrent action when "the interest of the public" safety "so requires." In other words this administrative agency charged with "assuring the highest degree of safety" in air transportation contends that § 609 supplies authority for making an example of Hard in order to deter him and other airline pilots from jeopardizing the safety of travelers by air. "Penalty," as a symbol repeatedly used by this petitioner is singularly ineffective for gauging the scope of power granted the Board by Congress. Power and jurisdiction flow from the total piece of legislation, under examination, for that reason the answer eludes capture with the single word "penalty." Legislative history and experience under the Act combine in firmly suggesting an interpretation at odds with the limited view put forward by this petitioner. At any rate the conclusion petitioner suggests—that the Board mandated a "penalty" is unpersuasive rather than a logically compelling linguistic technique. We think the Board's order is consonant with the Congressional grant

of power and consistent with achieving the statutory aim spelled out as the "highest degree of safety." Whether the Board's order has salutary effect is beside the mark for all the agency can do is strive for protection of the public traveling by aircraft. But the problem engendered by this appeal is, of course, not solved in isolation. For, as we show below, Hard participated in a serious episode appraised by the examiner as "marginal" with regard to fault and responsibility. What Hard contends for would drive the Board into an area of sharp black and white, leaving the gray zone unprotected when, in the exercise of its discretion, a qualified airline pilot's behavior merits suspension rather than revocation of rating.

After a non-fatal accident on February 17, 1956, at Owensboro, Kentucky, involving an Eastern Air Lines aircraft, Hard was piloting, his airline transport pilot rating (ATR) was suspended, on an emergency basis, for sixty days. During that suspension period the Administrator of Aeronautics filed a complaint with the Civil Aeronautics Board seeking a suspension or revocation of the ATR held by this petitioner. An examiner for CAB found that the 60 days suspension was in the public interest but that there was no violation of Civil Aeronautics Regulations. CAB, on review, ordered petitioner's airline transport pilot rating suspended for six months. The impact of the Board's order, stayed during this court's review, precludes petitioner from serving as an airline captain during the suspension period established by the Board, though he may act as a co-pilot by virtue of other unrevoked licenses currently held by him.

Lying behind the Board's ultimate action in ordering Hard's suspension for four months (crediting him with two months period under their emergency order) is this pilot's approach to the Owensboro Airport for landing under instrument conditions due to rain in the area. After

breaking through the overcast north of the field, petitioner determined to land on Runway 5 which runs to the northeast, a course of action which required that the aircraft be maneuvered to a point southwest of the field so that the aircraft could be landed in a northeasterly direction. Hard, piloting the aircraft during this approach, proceeded southwest to a point found by the Board to be approximately one-half mile to the left of the southwest end of Runway 5. He then began a descending and banking U turn to the left to enter the runway. The left bank steepened sharply on the approach; power was applied and the aircraft rolled to the right; and the right wing struck the ground at a point 330 feet short of the runway and 125 feet to its right. The aircraft was demolished, but none of the twenty-three persons on board sustained any serious injury. At the proceedings it was the Administrator's contention, and the Board so found in effect, that Hard had not allowed sufficient lateral suspension between the end of the runway and the point at which the turn began to permit a normal turn into the runway; that he persisted in attempting to land when it became apparent that a landing could be accomplished only through acrobatic maneuvers. There was no finding by the Board that Hard lacked flying ability.

Relying on § 609, the Administrator filed a complaint with CAB, on March 16, 1956, requesting revocation or suspension of petitioner's certificate based on alleged lack of qualification. CAB, through its Bureau of Safety Investigation (64 Stat. 972, 49 U. S. C. §§ 581, 592), held public hearings on March 22, 1956 and took testimony of witnesses, including this petitioner. Petitioner responded to the Administrator's complaint with an answer and motion to dismiss; the hearing examiner overruled the motion. Subsequently a trial on the merits was held by the Board's examiner and he found, in substance, that though the emergency suspension was in the public interest

there had been no violation of any rule, regulation or statute—or, succinctly put: Hard had not been shown to be unqualified to fly and that disciplinary action was uncalled for in the circumstances. The examiner's decision was appealed, June 1, 1956, by the Administrator to the Board. After the examiner's decision, but before the Board's final suspension order, its accident investigation report was issued, containing *inter alia* this statement: "The Board is of the opinion that these factors [outlined in the report] indicate poor planning and execution of the approach by Captain Hard." Several months later, the Board wrote its decision and stated among other aspects:

> "We agree with the Administrator that disciplinary action is called for in this case, and that the Board could not, by failure to impose a sanction, tacitly condone a course of action, which, even if no accident had resulted, would have brought an aircraft to within inches of disaster. On the other hand, we question whether respondent's conduct on this flight was so egregious as to require revocation in the public interest, when we consider his eleven year record as a captain for Eastern and over 8,000 hours of flying experience without a previous incident of this type, or any disciplinary action for violations of safety rules. This does not mean that a single violation by an experienced pilot cannot ever call for revocation of his rating, for in flagrant cases the Board has ordered revocation. But on the facts here involved, we believe that the carelessness shown is not so egregious as to point to the ultimate sanction of revocation. In our judgment, the accident itself, together with a substantial suspension of his airline transport rating, would provide a sufficient deterrent against respondent or other pilots taking similar risks with their passengers' lives.
>
> Accordingly, we find a six month suspension should be imposed upon respondent, . . ."

From its factual premises, that administrative logic is understandable and, again we comment on the absence of

a contest over the fact findings concerning the accident. To be sure the suspension of Hard, a qualified airman, at first appears as an arbitrary or unauthorized action but we think there is ample statutory foundation supporting the power asserted by the Board. Nothing we have found in the Act manifests a legislative purpose to hobble this agency in its exercise of discretion. Policy formulation is a legislative function.

Wilson v. *C. A. B.*, 244 F. 2d 773 (D. C. App. 1957)[6] currently pending on petition for certiorari is closely analogous to Hard's case and apparently the District of Columbia Court of Appeals was impressed by the Board's history that: "From the effective date of the Act of 1938 through June 20, 1956, the Board has suspended approximately 4000 airmen for violation of rules, without findings that they lacked competence or qualifications and without requiring re-examination before reinstatement." By a marginal note in its brief filed in our court the Board has supplied us with similar information. While, of course, a persistent course of error could not override judicial judgment, courts do and have consistently placed authoritative weight on interpretative rules and practices consistently followed over long periods by administrative agencies. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932), *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933). Without relying on the *Wilson* case we would leave the order brought before us for scrutiny undisturbed because in our opinion the Board acted within permissible limits of administrative interpretation circumscribed by the power and authority granted in §§ 2 and 609.

We find nothing in the record showing any steps taken by petitioner for deferment of the accident report at the Board level, despite his obvious awareness of the investi-

6. Supreme Court Doc. No. 434, 26 L. W. 3084.

gation. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683 (1948) adequately offsets petitioner's claim of pre-judgment by the Board. See Davis, Administrative Law, Chapter 9 (1951). Indeed, the absence of revocation manifests treatment of pilot Hard inconsistent with that argument his counsel now presses on us.

We affirm the Board's order presented for review by the petition filed in our court.

ORDER AFFIRMED.

STATUTES INVOLVED.

The Civil Aeronautics Act of 1938 (52 Stat. 973) as amended, (49 U. S. C. 401 *et seq.*), provides in part:

Declaration of Policy.

Sec. 2. [*52 Stat. 973, 980, 49 U. S. C. 402*] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers.

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

201(b) There shall be in the Board an Administrator who shall be appointed by the President by and with the advice and consent of the Senate, and who shall receive a salary at the rate of $15,000 per annum.

SEC. 301. [*52 Stat. 985, 49 U. S. C. 451*] The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States, and abroad, and to encourage the establishment of civil airways, landing areas, and other air navigation facilities. The Administrator shall cooperate with the Board in the administration and enforcement of this Act.

SEC. 401(h) The Board upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Sec. 609 (52 Stat. 1011, 49 U. S. C. A. 559)

"The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . . ."

Sec. 702 (49 U. S. C. A. 592 Reorg. Plan No. IV 1940 52 Stat. 1012, 49 U. S. C. A. 581, 582).

(a) It shall be the duty of the Board to

(1) Make rules and regulations governing notification and report of accidents involving aircraft;

(2) Investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof;

(3) Make such reports public in such form and manner as may be deemed by it to be in the public interest; and

(4) Ascertain what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by investigating complaints filed with the Board, and by conducting special studies and investigations, on matters pertaining to safety in air navigation and the prevention of accidents.

Sec. 901 (52 Stat. 1015, 49 U. S. C. A. 621)

"(a) Any person who violates (1) any provision of subchapters V, VI, and VII of this chapter, or any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Postmaster General under this chapter, shall be subject to

a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Board or the Postmaster General, as the case may be . . . ."

"(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty . . . ."

Sec. 903 (52 Stat. 1017, 49 U. S. C. A. 623)

"(b) (1) Any civil penalty imposed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be re-examined other than in accordance with the rules of the common law . . . ."

"(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

REGULATIONS, INVOLVED.

C.A.R. 21.16, 14 C.F.R. 21.16 *Aeronautical experience.*

An applicant for an airline transport pilot rating shall hold a valid commercial pilot rating, or equivalent as determined by the Administrator, and shall meet the following aeronautical experience requirements:

(a) Applicant shall have had at least 250 hours of flight time composed of time as pilot in command, or time as copilot actually performing the duties and functions of a pilot in command under the surveillance of the pilot in command, or any combination thereof. Of this time, at least 100 hours shall have been cross-country flight time, and at least 25 hours shall have been night flight time. Flight time shown in fulfillment of the requirements of this paragraph may also be used for the purposes of paragraph (b) of this section.

(b) Applicant shall have had at least 1,200 hours of flight time as pilot within the last 8 years, of which

(1) 5 hours shall have been had within 60 days immediately preceding the date of application;

(2) 500 hours shall have been cross-country flight time;

(3) 100 hours shall have been night flight time;

(4) 75 hours shall have been instrument time under actual or simulated instrument conditions of which not less than 50 hours shall have been in actual flight.

C.A.R. 21.24, 14 C.F.R. 21.24.

(d) Nothing in this section shall be construed to deny or defeat the jurisdiction of the Federal courts, the Administrator, or the Board to impose any authorized sanc-

tion, including revocation of the certificate, for a violation of the act or of the regulations in this sub-chapter occurring during the effective period of the certificate.

C.A.R. 21.41, 14 C.F.R. 21.41 *Passenger carrying.*

A certificated airline transport pilot shall not pilot any aircraft carrying any person other than members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless, within the 90 days immediately preceding, he shall have made at least 3 take-offs, and three landings to a full stop, in an aircraft of the same category (§ 21.34) and if an airplane, within the same class (§ 21.35 (a)) as that of the aircraft in which any such person is carried.

C.A.R. 21.42, 14 C.F.R. 21.42 *Recent experience requirements.*

(a) *Passenger flight (day and night).* A certificated airline transport pilot shall not pilot an aircraft carrying any person other than the members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless within the preceding 3 calendar months he shall have made and logged at least 3 take-offs and landings to a full stop in an aircraft of the same category, class, and type as that of the aircraft in which such person is carried.

(b) *Instrument flight.* A certificated airline transport pilot, who within the preceding 6 calendar months has not flown and logged at least 2 hours of flight time solely by reference to instruments under either actual or properly simulated instrument flight conditions, shall not pilot an aircraft under such conditions until he has flown and logged at least 2 hours of such flight time accompanied by a cer-

tificated pilot of at least private grade holding an appropriate category, class, and type rating for the aircraft and authorized to operate aircraft under instrument conditions.

C.A.R. 40.301, 14 C.F.R. 40.301 *Pilot recent experience.*

No air carrier shall schedule a pilot to serve as such in scheduled air transportation unless within the preceding 90 days he has made at least 3 take-offs and 3 landings in the airplane of the particular type on which he is to serve.

C.A.R. 40.302, 14 C.F.R. 40.302 *Pilot checks.*

(a) Line check: Prior to serving as pilot in command, and at least once each 12 months thereafter, a pilot shall satisfactorily accomplish a line check in one of the types of airplanes normally to be flown by him. This check shall be given by a check pilot who is qualified for the route. It shall consist of a least a scheduled flight between terminals over a route to which the pilot is normally assigned during which the check pilot shall determine whether the individual being checked satisfactorily exercises the duties and responsibilities of pilot in command.

(b) Proficiency check: (1) An air carrier shall not utilize a pilot as pilot in command until he has satisfactorily demonstrated to a check pilot or a representative of the Administrator his ability to pilot and navigate airplanes to be flown by him. Thereafter, at least twice each 12 months at intervals of not less than 4 months or more than 8 months, a similar pilot proficiency check shall be given each such pilot. Where such pilots serve in more than one airplane type, the pilot proficiency check shall be given in the larger airplane type at least once each 12 months.

C.A.R. 60.12, 14 C. F. R. 60.12 *Careless or reckless operation.*

No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others.

PART 303—RULES OF PRACTICE IN AIRCRAFT ACCIDENT INQUIRIES.

§ 303.1 (14 C.F.R. 303.1) *Nature of inquiry.* Aircraft accident inquiries are held by the Board as a part of the investigation of accidents involving aircraft in order to determine the facts, conditions, and circumstances relating to each accident and the probable cause thereof and to ascertain measures which will best tend to prevent similar accidents in the future. It is purely a fact-finding procedure, and there are no formal pleadings or issues and no adverse parties and during the course of the hearing no objections to any matter will be entertained from any party to the investigation or any other person. Aircraft accident inquiries are not subject to the provisions of Secs. 4, 5, 7, 8, or 10 of the Administrative Procedure Act.

§ 303.2 *Institution of inquiry.* The Director, Bureau of Safety, shall, on behalf of the Board, order an inquiry into an accident involving aircraft whenever he deems it necessary in the public interest.

§ 303.13 *Examination of Witnesses.* (a) Witnesses will be examined by the Board of Inquiry. Following such examination the parties to the investigation who have indicated at the prehearing conference their desire to examine such witnesses will be given an opportunity to do so. If a party to the investigation who has not indicated at the prehearing conference an intention to examine a witness, desires to do so, he may make a request to the Presiding Officer along with his justification as to why such examination is now deemed necessary. The Presiding Officer will then determine whether to permit examination by such party to the investigation.

(b) Materiality, relevancy and competency of witness'

testimony, exhibits or physical evidence will not be the subject of objections by a party to the investigation or any other person, but such matters will be controlled by rulings of the Presiding Officer on his own motion. If the examination of a witness by a party to the investigation is interrupted by a ruling of the Presiding Officer, opportunity will be given to show materiality, relevancy or competency of the testimony or evidence sought to be elicited from the witness.

§ 303.14 *Evidence.* The Presiding Officer shall receive all testimony and exhibits which might be of aid in determining the cause of the accident. He may exclude any testimony or exhibits which are not pertinent to the inquiry or which are merely cumulative. He may withhold from public disclosure any evidence, pending a final determination by the Board as to whether it is in the public interest to release such evidence.

Board Report.

§ 303.22 *Basis of report.* The Board's report as to the facts, conditions, and circumstances relating to the accident and the probable cause thereof shall be based upon the docket of the inquiry, together with any other information which has come to the attention of the Board and its staff.